

Introduced by Senator Denham

February 21, 2003

An act to amend Section 20133 of the Public Contract Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

SB 908, as introduced, Denham. County design-build contracts.

Existing law requires public entities to comply with certain procedures in soliciting and evaluating bids and awarding contracts for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement.

Existing law, operative until January 1, 2006, permits counties, with the approval of the board of supervisors, to enter into design-build contracts, as defined, in accordance with specified provisions. These provisions require that contracts with a cost ranging from \$10,000,000 to \$20,000,000 be awarded to the lowest responsible bidder, and authorizes contracts costing more than \$20,000,000 to be awarded to the lowest responsible bidder or by best value.

This bill would, instead, require that any design-build contract entered into by a county under these provisions costing less than \$20,000,000 be awarded to the lowest responsible bidder.

The bill would also add Monterey County to those counties that may elect to use these provisions.

This bill would make legislative findings and declarations as to the necessity of a special statute.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 20133 of the Public Contract Code is amended to read:

20133. (a) (1) This section provides for an alternative procedure on bidding on building construction projects ~~in excess of ten million dollars (\$10,000,000)~~ *of less than twenty million dollars (\$20,000,000)* applicable only in the Counties of Alameda, Contra Costa, Monterey, Sacramento, Santa Clara, Solano, Sonoma, and Tulare, upon approval of the appropriate board of supervisors.

(2) For ~~projects a project~~ with costs ~~ranging from ten million dollars (\$10,000,000) to~~ *of less than twenty million dollars (\$20,000,000), inclusive*, the contract shall be awarded to the lowest responsible bidder. For ~~projects a project~~ costing ~~over~~ twenty million dollars (\$20,000,000) *or over*, the county may award the project using either the lowest responsible bidder or by best value.

(b) (1) It is the intent of the Legislature to enable these counties to utilize cost-effective options for building and modernizing public facilities. The Legislature also recognizes the national trend, including authorizations in California, to allow public entities to utilize design-build contracts as a project delivery method.

(2) The Legislature also finds and declares that utilizing a design-build contract requires a clear understanding of the roles and responsibilities of each participant in the design-build process. The benefits of a design-build contract project delivery system include an accelerated completion of the projects, cost containment, reduction of construction complexity, and reduced exposure to risk for the county. The Legislature also finds that the cost-effective benefits to the counties are achieved by shifting the liability and risk for cost containment and project completion to the design-build entity.

(3) It is the intent of the Legislature to provide an alternative and optional procedure for bidding and building construction projects for these counties.

(4) The design-build approach may be used, but is not limited to use, when it is anticipated that it will ~~reduce~~ project cost,

1 expedite project completion, or provide design features not
2 achievable through the design-bid-build method.

3 (5) If the board of supervisors of *a county* elects to proceed
4 under this section, the board of supervisors shall establish and
5 enforce for design-build projects a labor compliance program
6 containing the requirements outlined in Section 1771.5 of the
7 Labor Code, or it shall contract with a third party to operate *on the*
8 *county's behalf* a labor compliance program containing the
9 requirements outlined in Section 1771.5 of the Labor Code. This
10 requirement shall not apply to any project where the county or the
11 design-build entity has entered into any collective bargaining
12 agreement or agreements that bind all of the contractors
13 performing work on the projects.

14 (c) As used in this section:

15 (1) "Best value" means a value determined by objective
16 criteria and may include, but is not limited to, price, features,
17 functions, life-cycle costs, and other criteria deemed appropriate
18 by the county.

19 (2) "Design-build" means a procurement process in which
20 both the design and construction of a project are procured from a
21 single entity.

22 (3) "Design-build entity" means a partnership, corporation, or
23 other legal entity that is able to provide appropriately licensed
24 contracting, architectural, and engineering services as needed
25 pursuant to a design-build contract.

26 (d) Design-build projects shall progress in a four-step process,
27 as follows:

28 (1) (A) The county shall prepare a set of documents setting
29 forth the scope of the project. The documents may include, but are
30 not limited to, the size, type and desired design character of the
31 buildings and site, performance specifications covering the quality
32 of materials, equipment, and workmanship, preliminary plans or
33 building layouts, or any other information deemed necessary to
34 describe adequately the county's needs. The performance
35 specifications and any plans shall be prepared by a design
36 professional who is duly licensed and registered in California.

37 (B) Any architect or engineer retained by the county to assist
38 in the development of the ~~project-specific~~ *project-specific*
39 documents shall not be eligible to participate in the preparation of
40 a bid with any design-build entity for that project.

(2) (A) Based on the documents prepared in paragraph (1), the county shall prepare a request for proposals that invites interested parties to submit competitive sealed proposals in the manner prescribed by the county. The request for proposals shall include, but is not limited to, the following elements:

(i) Identification of the basic scope and needs of the project or contract, the expected cost range, and other information deemed necessary by the county to inform interested parties of the contracting ~~opportunity~~, to *opportunity*. *This other information shall include the methodology that will be used by the county to evaluate proposals, and specifically if whether the contract will be awarded to the lowest responsible bidder.*

(ii) Significant factors ~~which~~ *that* the county reasonably expects to consider in evaluating proposals, including cost or price and all nonprice related factors.

(iii) The relative importance of *the* weight assigned to each of the factors identified in the request for proposals.

(B) With respect to clause (iii) of paragraph (A), if a nonweighted system is used, the agency shall specifically disclose whether all evaluation factors other than cost or price when combined are:

(i) Significantly more important than cost or price.

(ii) Approximately equal in importance to cost or price.

(iii) Significantly less important than cost or price.

(C) If the county chooses to reserve the right to hold discussions or negotiations with responsive bidders, it shall so specify in the request for ~~proposal~~ *proposals* and shall publish separately or incorporate into the request for ~~proposal~~ *proposals* applicable rules and procedures to be observed by the county to ensure that any discussions or negotiations are conducted in good faith.

(3) (A) The county shall establish a procedure to prequalify design-build entities using a standard questionnaire developed by the county. In preparing the questionnaire, the county shall consult with the construction industry, including representatives of the building trades and surety industry. This questionnaire shall require information including, but not limited to, all of the following:

(i) If the design-build entity is a partnership, limited partnership, or other association, a listing of all of the partners,

1 general partners, or association members known at the time of bid
2 submission who will participate in the design-build contract,
3 including, but not limited to, mechanical subcontractors.

4 (ii) Evidence that the members of the design-build entity have
5 completed, or demonstrated the experience, competency,
6 capability, and capacity to complete projects of similar size, scope,
7 or complexity, and that proposed key personnel have sufficient
8 experience and training to competently manage and complete the
9 design and construction of the project, as well as a financial
10 statement that assures the county that the design-build entity has
11 the capacity to complete the project.

12 (iii) The licenses, registration, and credentials required to
13 design and construct the project, including information on the
14 revocation or suspension of any license, credential, or registration.

15 (iv) Evidence that establishes that the design-build entity has
16 the capacity to obtain all required payment and performance
17 bonding, liability insurance, and errors and omissions insurance.

18 (v) Any prior serious or willful violation of the California
19 Occupational Safety and Health Act of 1973, contained in Part 1
20 (commencing with Section 6300) of Division 5 of the Labor Code
21 or the federal Occupational Safety and Health Act of 1970 (Public
22 Law 91-596), settled against any member of the design-build
23 entity, and information concerning workers' compensation
24 experience history and a worker safety program.

25 (vi) Information concerning any debarment, disqualification,
26 or removal from a federal, state, or local government public works
27 project. Any instance where an entity, its owners, officers, or
28 managing employees submitted a bid on a public works project
29 and were found to be nonresponsive, or were found by an awarding
30 body not to be a responsible bidder.

31 (vii) Any instance where the entity, its owner, officers, or
32 managing employees defaulted on a construction contract.

33 (viii) Any violations of the Contractors' State License Law
34 (Chapter 9 (commencing with Section 7000) of Division 3 of the
35 Business and Professions Code), excluding alleged violations of
36 federal or state law including the payment of wages, benefits,
37 apprenticeship requirements, or personal income tax withholding,
38 or of Federal Insurance Contribution Act (FICA) withholding
39 requirements settled against any member of the design-build
40 entity.

1 (ix) Information concerning the bankruptcy or receivership of
2 any member of the design-build entity, including information
3 concerning any work completed by a surety.

4 (x) Information concerning all settled adverse claims, disputes,
5 or lawsuits between the owner of a public works project and any
6 member of the design-build entity during the five years preceding
7 submission of a bid pursuant to this section, in which the claim,
8 settlement, or judgment exceeds fifty thousand dollars (\$50,000).
9 Information shall also be provided concerning any work
10 completed by a surety during this period.

11 (xi) In the case of a partnership or other association, that is not
12 a legal entity, a copy of the agreement creating the partnership or
13 association and specifying that all partners or association members
14 agree to be fully liable for the performance under the design-build
15 contract.

16 (B) The information required pursuant to this subdivision shall
17 be verified under oath by the entity and its members in the manner
18 in which civil pleadings in civil actions are verified. Information
19 that is not a public record pursuant to the California Public Records
20 Act (Chapter 3.5, ~~Division 7~~, 3.5 (*commencing with Section 6250*)
21 *of Division 7 of Title 1 of the Government Code*) shall not be open
22 to public inspection.

23 (4) The county shall establish a procedure for final selection of
24 the design-build entity. Selection shall be based on either of the
25 following criteria:

26 (A) A competitive bidding process resulting in lump-sum bids
27 by the prequalified design-build entities. Awards shall be made to
28 the lowest responsible bidder.

29 (B) A county may use a design-build competition based upon
30 best value and other criteria set forth in paragraph (2) of
31 subdivision (d). The design-build competition shall include the
32 following elements:

33 (i) Competitive proposals shall be evaluated by using only the
34 criteria and selection procedures specifically identified in the
35 request for proposal. However, the following minimum factors
36 shall collectively represent at least 50 percent of the total weight
37 of consideration given to all criteria ~~factors; price, technical design~~
38 ~~and construction expertise, life cycle costs over 15 years or more,~~
39 ~~skilled labor force availability, and acceptable safety record.~~
40 *factors:*

1 (I) *Price.*

2 (II) *Technical design and construction expertise.*

3 (III) *Life cycle costs over 15 years or more.*

4 (IV) *Skilled labor force availability.*

5 (V) *Acceptable safety record.*

6 (ii) Once the evaluation is complete, the top three responsive
7 bidders shall be ranked sequentially from the most advantageous
8 to the least.

9 (iii) The award of the contract shall be made to the responsible
10 bidder whose proposal is determined, in writing, to be the most
11 advantageous.

12 (iv) Notwithstanding any provision of this code, upon issuance
13 of a contract award, the county shall publicly announce its award,
14 identifying the contractor to whom the award is made, along with
15 a written decision supporting its contract award and stating the
16 basis of the award. The notice of award shall also include the
17 county's second and third ranked design-build entities.

18 (v) For the purposes of this paragraph, "skilled labor force
19 availability" shall be determined by the existence of an agreement
20 with a registered apprenticeship program, approved by the
21 California Apprenticeship Council, which has graduated
22 apprentices in each of the preceding five years. This graduation
23 requirement shall not apply to programs providing apprenticeship
24 training for any craft that has been deemed by the Department of
25 Labor and the Department of Industrial Relations to be an
26 apprenticeable craft in the five years prior to enactment of this act.

27 (vi) For the purposes of this paragraph, a bidder's "safety
28 record" shall be deemed "acceptable" if ~~their~~ *either of the*
29 *following apply:*

30 (I) *The bidder's* experience modification rate for the most
31 recent three-year period is an average of 1.00 or less, and ~~their~~ *its*
32 average Total Recordable Injury/Illness rate and average lost work
33 rate for the most recent three-year period does not exceed the
34 applicable statistical standards for its business category ~~or if the~~
35 *category.*

36 (II) *The bidder* is a party to an alternative dispute resolution
37 system as provided for in Section 3201.5 of the Labor Code.

38 (e) (1) Any design-build entity that is selected to design and
39 build a project pursuant to this section shall possess or obtain
40 sufficient bonding to cover the contract amount for nondesign

1 services, and errors and omission insurance coverage sufficient to
2 cover all design and architectural services provided in the contract.
3 This section does not prohibit a general or engineering contractor
4 from being designated the lead entity on a design-build entity for
5 the purposes of purchasing necessary bonding to cover the
6 activities of the design-build entity.

7 (2) Any payment or performance bond written for the purposes
8 of this section shall be written using a bond form developed by the
9 county.

10 (f) All subcontractors that were not listed by the design-build
11 entity in accordance with clause (i) of subparagraph (A) of
12 paragraph (3) of subdivision (d) shall be awarded by the
13 design-build entity in accordance with the design-build process set
14 forth by the county in the design-build package. All subcontractors
15 bidding on contracts pursuant to this section shall be afforded the
16 protections contained in Chapter 4 (commencing with Section
17 4100) of Part 1. The design-build entity shall do both of the
18 following:

19 (1) Provide public notice of the availability of work to be
20 subcontracted in accordance with the publication requirements
21 applicable to the competitive bidding process of the county.

22 (2) Provide a fixed date and time on which the subcontracted
23 work will be awarded in accordance with the procedure
24 established pursuant to this section.

25 (g) The minimum performance criteria and design standards
26 established pursuant to paragraph (1) of subdivision (d) shall be
27 adhered to by the design-build entity. Any deviations from those
28 standards may only be allowed by written consent of the county.

29 (h) The county may retain the services of a design professional
30 or construction project manager, or both, throughout the course of
31 the project in order to ensure compliance with this section.

32 (i) Contracts awarded pursuant to this section shall be valid
33 until the project is completed.

34 (j) Nothing in this section is intended to affect, expand, alter,
35 or limit any rights or remedies otherwise available at law.

36 (k) (1) If the county elects to award a project pursuant to this
37 section retention proceeds withheld by the county from the
38 design-build entity shall not exceed 5 percent if a performance and
39 payment bond, issued by an admitted surety insurer, is required in
40 the solicitation of bids.



(2) In a contract between the design-build entity and the subcontractor, and in a contract between a subcontractor and any subcontractor thereunder, the percentage of the retention proceeds withheld may not exceed the percentage specified in the contract between the county and the design-build entity. If the design-build entity provides written notice to any subcontractor who is not a member of the design-build entity, prior to or at the time the bid is requested, that a bond may be required and the subcontractor subsequently is unable or refuses to furnish a bond to the design-build entity, then the design-build entity may withhold retention proceeds in excess of the percentage specified in the contract between the county and the design-build entity from any payment made by the design-build entity to the subcontractor.

(l) Each county that elects to proceed under this section and uses the design-build method on a public works project shall submit to the Legislative Analyst's office, the Senate Committee on Local Government, and the Assembly Committee on Local Government before December 1, 2004, a report containing a description of each public works project procured through the design-build process, and completed on or before November 1, 2004. The report shall include, but shall not be limited to, all of the following information:

- (1) The type of facility.
- (2) The gross square footage of the facility.
- (3) The design-build entity ~~who~~ *that* was awarded the project.
- (4) The estimated and actual length of time to complete the project.
- (5) The estimated and actual project costs.
- (6) A description of any written protests concerning any aspect of the solicitation, bid, proposal, or award of the design-build project, including the resolution of the protests.
- (7) An assessment of the prequalification process and criteria.
- (8) An assessment of the impact of ~~retaining~~ *withholding* 5 percent retention *proceeds* on the project.
- (9) A description of the Labor Force Compliance program and an assessment of the project impact, where required.
- (10) A description of the method used to award the contract. If best value was the method, the factors used to evaluate the bid shall be described, including the weighting of each factor and an assessment of the effectiveness of the methodology.

1 (11) An assessment of the project impact of “skilled labor force
2 availability”.

3 (12) An assessment of the design-build dollar limits on county
4 projects. This shall include projects where the county wanted to
5 use design-build ~~and~~ *but* was precluded by the dollar limitation.
6 It shall also include projects where the best value method of
7 awarding contracts was not used, due to dollar limitations.

8 (13) An assessment of the most appropriate uses for the
9 design-build approach.

10 (m) Any county named in this section that elects to not use the
11 authority granted herein may also submit a report to the entities
12 named and in accordance with the schedule in subdivision (l). This
13 report may include an analysis of why the authority granted herein
14 was not used by the county.

15 (n) On or before January 1, 2005, the Legislative Analyst shall
16 report to the Legislature on the use of the design-build method by
17 counties pursuant to this section, including the information listed
18 in subdivision (l). The report may include recommendations for
19 modifying or extending this section.

20 (o) This section shall remain in effect only until January 1,
21 2006, and as of that date is repealed, unless a later enacted statute,
22 that is enacted before January 1, 2006, deletes or extends that date.

23 SEC. 2. The Legislature finds and declares that a special law
24 is necessary and that a general law cannot be made applicable
25 within the meaning of Section 16 of Article IV of the California
26 Constitution because of the unique need to build and modernize
27 public facilities in a cost-effective manner in Monterey County.

